been a lot done in this area, but it certainly is one that will no doubt in Judge Breyer's long tenure on the court come up before the Court.

Again, I apologize for interrupting, and I thank the chairman.

The CHAIRMAN. Thank you, and I thank Senator Hatch for letting me go over. I will have no more questions for the remainder of this hearing. I will yield to Senator Hatch, and we will close with Senator Hatch's questioning.

Would you like a break?

Judge BREYER. No; I am fine.

The CHAIRMAN. Then we will finish with Senator Hatch.

Senator HATCH. Judge, after hearing Senator Biden's predictions of how tough it is going to be on the Court, maybe you want to withdraw.

Judge BREYER. No, thanks.

Senator HATCH. Actually, when you are talking about the *Rust* case, you are talking about a funded speech case instead of a free speech case. Basically, it should be pointed out that the case——

The CHAIRMAN. That is the whole point.

Senator HATCH [continuing]. You made the point; I thought you did make it rather well—that the case involved regulations governing Federal funding of title X family planning programs. And those regulations did not bar any speech; they simply prevented the use of Federal Government dollars to fund pro-abortion counseling and referrals.

Now, it was a perfect illustration of how the Court ruled one way and the Congress of the United States overruled the Court in an appropriate way, according to the majority. I happen to disagree with that, but it was the way the democratic system should work. So I would submit it is a funded speech case instead of a free speech case. Nothing would have prevented the doctor from speaking as freely as the doctor wanted to. He just could not use Federal dollars to do it under the Court's ruling.

I would feel very badly if I did not say a few words about Justice Scalia, because I think there are some misinterpretations here that conservative jurists like Justice Scalia are inconsistent in their approaches to statutory and constitutional interpretations. Some are arguing that. But let me quote from a Law Review article that is critical of Justice Scalia's method of statutory interpretation, but an article which is also critical of many of his critics as well. It says:

> Many of Justice Scalia's critics point to an apparent inconsistency in his approach to constitutional provisions as opposed to statutes. While he takes a "textualist" approach to statutes and criticizes the use of legislative history to establish legislative intent, they argue, he takes a sharply originalist turn in constitutional adjudication, basing his arguments on the intentions of the Framers. Justice Scalia does indeed consider himself an originalist in constitutional adjudication, but his brand of originalism does not rest on the intent of the Framers as revealed in the proceedings of the Philadelphia Convention. Instead, he relies upon the original understanding of constitutional terms, based on arguments similar to those he uses in interpreting statutes. These include arguments from text, context, purpose, contemporaneous usage of language, and the structure of the constitutional scheme, including separation of powers and federalism.

I think that is a more accurate description of Justice Scalia. In other words, Justice Scalia's statutory interpretation and constitu-

tional jurisprudence of original meaning are really consistent. And you have pointed that out.

Now, you would go farther, and perhaps I would also, in looking at what the Senators and Congresspeople have said from the standpoint of statutory construction and also legislative history and examine that. I see nothing wrong with that, either.

But you, having been upon Capitol Hill and realizing that this sausage that we call legislation, how it is made sometimes, you have to very carefully—and I think this is what Scalia is saying—look behind, really, what the words are to really find what was really meant, because as you know, sometimes they just throw whole statements into the record that nobody debates at all. All they have got to do is sign it and put it in the record, and they can skew any legislative history any way they want to.

So I think you would agree, would you not, that you have to be very careful when you look at legislative history, that you just do not buy all the words that are put there by Members of Congress or members of State legislatures or Federal bureaucrats or the President; right?

Judge BREYER. Yes; you use it; you do not abuse it.

Senator HATCH. That is right, and I think you have made that pretty clear, and I want to compliment you for doing that as well.

I have some differences with Senator Biden on the takings issue also, and I have to say I also differ with Chairman Biden on *Patterson* v. *McLean.* In that case, in my view, the Supreme Court resisted legislating from the Bench to reach a feel-good result. The Court respected the differing roles of the judiciary and the legislature and properly left to the Congress the role of revising the statute in question, rather than injecting the Court's own policy preferences in the matter. In *Patterson,* the primary issue was whether section 1 of the Civil Rights Act of 1966, also known as section 1981, prohibited racial harassment on the job. And frankly, we have to note that it is not an employment discrimination statute. It reads in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right, in every State and Territory, to make and enforce contracts.

Now, the Court said that the statute does not reach conduct occurring after the contract has been made. The statute does not cover the "terms, conditions, or privileges of employment," as title VII of the 1964 Civil Rights Act does. Indeed, the absence of such a broad statute was one reason that title VII became necessary in the first place. So the Court ruled maybe too narrowly, certainly in the eyes of the Congress, which later in a sense overruled that, but nevertheless ruled properly because that was the language of the statute; it was the meaning at the time. And we were able to correct that, and I participated in doing so, as a statutory result.

Isn't that a correct——

Judge BREYER. Not discussing the merits of the case; that is, I did think that probably my instinct would have been to look at the legislative history, but I have not looked at it and do not know what I would have found.

Senator HATCH. Well, that is right. And I think sometimes we get too caught up in this Scalia debate on whether or not he means anything with regard to looking at original meaning and what

those original words meant and what the context of those original words actually meant, when actually, he means a lot more than just trying to interpret the law on a very narrow basis. And I think you know that; right?

Judge BREYER. I have attended lectures that he has given; they are very interesting, and I think it is more. I agree with you. He has a theory——

Senator HATCH. I wish I could be in some of those meetings, listening to you and Scalia, because I believe that you and Scalia are going to become very good friends. I am going to encourage him. [Laughter.]

And I believe you will be very good for each other. You are two brilliant intellects, and both of you are excellent lawyers, and both of you are, in my opinion, very, very fine people. So I suspect you are going to really like each other, although you will differ from time to time. And we will just have to see what happens. I will be carefully reading and watching, however.

Now, let me just return briefly to the subject of the establishment clause—and I do not want to keep you too late; I know this is very tiring, and I know that you have had a long day, but these are really important issues, and I apologize for keeping you a little longer. But in your testimony yesterday, you stated that "when I think of the establishment clause, I think of Jefferson, and I think of a wall."

Now, I was a little bit surprised by your use of the wall metaphor, because it seems to me in tension with your fine concurrence in the case called *Members of Jamestown School Community* v. *Schmidt,* back in 1983, in your circuit. As you will recall, in that case, the first circuit largely upheld a Rhode Island statute providing bus transportation for nonpublic school children, including children attending religious schools. And in your concurrence, you found that the majority opinion was too hostile to neutral State programs that provide proportionate benefits to students who attend religious schools. In particular, as I read the case, you stated that you "believe the establishment clause calls for a more practical approach to this type of problem than the comparatively theoretical approach taken by the majority."

Now, it seems to me that the wall metaphor—which, incidentally, is not derived from the Constitution itself, or from ratification debates, but rather from a private letter written by Thomas Jefferson years later—reflects the very type of impractical theoretical approach that you criticized in your concurrence in that case. It certainly is not a metaphor that assists analysis, in my opinion. And moreover, it is most often used by those who are hostile to governmental accommodation to religion.

So I think it is an overused metaphor, between you and me, and I think you pretty well stated that in your concurring opinion in that case. And as you know, Supreme Court opinions clearly appear to uphold the constitutionality of a school voucher system that enables students to choose among various schools, including religious schools.

Now, some people think that introducing competition into our school system would—and I personally believe that—promote a much needed improvement in quality. So I was encouraged by your

Jamestown concurrence to believe that you would also support such a voucher system against establishment clause challenge.

Now, without asking your views on a voucher system, I might just mention maybe in predicate to that, vouchers, it seems to me, would eliminate many of the thorny issues that arise because many students as a practical matter are compelled to attend public schools. And a lot of these issues you have been grappling with, both as a judge and in these hearings, it seems to me might be eliminated if a voucher system were used. But without asking your views on a voucher system, I would like to know whether you adhere to the views that you gave in your *Jamestown* concurrence.

Judge BREYER. Yes.

Senator HATCH. Well, I thought you would. And do you think I have misstated it?

Judge BREYER. No; I think that the point of the practical approach is you have instances in which the question under the establishment clause is has the Government injected religion too far into a secular institution. That is not what you are talking about now.

Senator HATCH. That is right.

Judge BREYER. You are talking about the other issue, which is to what extent can the Government aid a religious institution. And there, I have said several times, and I certainly think that the answer is zero. Everybody understands that the fire department will go put out the fire in the church. Everyone understands that the church will benefit in many ways from all kinds of public services. Everyone understands that the church school will.

But the question becomes—and this is what I think is a practical question—when does it go too far and suddenly become what looks like the State support of one religion against another, or religion against nonreligion. If the State would support my synagogue, I might think: Fine. If they are going to support somebody else's church, I might think: Hmm. And each church might think: The other, no, but mine, yes. But we live in a society of so many different groups that it is important that those groups do not see the State as supporting the religion of another, or religion versus—I mean, that is the basic theory, and I think these are practical questions about when the age when the church is——

Senator HATCH. So you have an open mind with regard to these establishment questions.

Judge BREYER. I would hope so. I would hope so.

Senator HATCH. Well, I believe you do. But let me just introduce an institutional question of how a Justice should decide a constitutional question where the relevant constitutional clause is unclear. It has been suggested by one of my colleagues on the other side of the aisle that a Justice should err on the side of freedom. Putting aside the fact that virtually every case involves competing freedoms, it seems to me that just as the Constitution does not enshrine an economic theory of unbridled free enterprise, it also does not enshrine a political theory of radical libertarianism, either.

Now, you agreed with me yesterday that a judge's legitimacy derives solely from the fact that the judge is applying the law. Where the Constitution is unclear on an issue, what authority then does a Justice have to override the result reached by the political

branches whose members, it must not be forgotten, are also sworn to uphold the Constitution? Stated differently, if the meaning or application of a relevant constitutional clause in a particular case is at bottom unclear, how can that unclear clause provide a Justice the mandate needed to strike down a law as being in conflict with it?

Judge BREYER. Where a clause is unclear, there is no escaping the requirement to find its meaning. The meaning, once found, might be consistent with the legislative enactment, or it might not. Obviously, in finding its meaning, a Court is also guided by the Constitution's own division of authority into three separate branches, and its understanding that legislation is given to the legislature to enact, that is, Congress.

But one does have to find the meaning; otherwise, there is no way to know how to decide the case. To find the meaning, you begin with the text, but as you say, the text is very unclear in the example you are thinking of. You go back into history, and you look at what the Framers are likely to have intended. And often—or sometimes, anyway—that will not answer the question, because they may have intended the meaning to encapsulate certain important values, which values may stay the same, but the conditions in which they are applied may have changed. So you look to precedent, and you look to tradition, and you look to history if the case is really difficult. And you have to have some understanding of the practical facts of how people live. And all those are meant to be not unleashing the subjective opinion of the judge, but rather, as factors that inevitably in these tough cases, judges have to look to.

Senator HATCH. Would you look to just making a guess?

Judge BREYER. No, you cannot just make a guess.

Senator HATCH. Why should that become constitutional law?

Judge BREYER. You cannot; you cannot just make a guess, and there are certain chains, there are certain safeguards. I always think an intellectual safeguard is the safeguard of the judge thinking to himself: Remember, the decision you make has to be one that you believe other judges would also make if they understand the law and do not have your personality. And remember, too, that the decision that you make, if you are interpreting the Constitution of the United States, is a decision that Congress cannot change. So be careful of trying to remake the boat while it is in the middle of the ocean. Be careful.

Senator HATCH. All right.

Judge BREYER. And remember, too, that 20 or 30 years from now, you had better be thinking to yourself right now that people who study this with care—and those are not necessarily scholars; that can be any man, woman, child in the United States—people who look back at this with care will think, yes, that decision interpreted the Constitution in a way that ought permanently to be the law.

Those are intellectual checks that try to make the factors that I mentioned factors that do not unchain the personality of the judge, that hold the judge back from legislating, but permit the Constitution to adapt to changing circumstances in a way that I believe the Framers intended.

Senator HATCH. Let me move to just a couple of cases. You are familiar with *Washington* v. *Davis,* which is of course an equal protection clause case.

Judge BREYER. Yes, yes.

Senator HATCH. Let me just say this. In *Washington* v. *Davis,* the Supreme Court held that in order to trigger the strict scrutiny standard of review under the equal protection clause, a plaintiff must establish that a Government practice or policy with a disparate impact upon minorities was instituted with a discriminatory intent. That is basically what *Washington* v. *Davis* said.

Only if such intent is shown must the Government have a compelling interest in order to justify its policy. Now, in the absence of any showing of discriminatory intent under *Washington* v. *Davis,* a challenged practice is subject to the rational basis standard of review.

Do you believe that *Washington* v. *Davis* is settled law; and second, do you believe it was correctly decided?

Judge BREYER. I know that in most of these areas—I think what you are saying—the part that I am uncertain of—I know that when you look at the equal protection clause pure and simple, without a statute, I believe that that discriminatory intent test is the one that has been applied. I think most of these areas by Congress have been turned into statutory areas, and once you get into statutes like title VII and a number of other areas, you discover the tests, as you have tried to implement the equal protection clause, expand into disparate impact analysis as well.

So I suspect that most of these cases arise in the statutory context rather than—at least racial discrimination, and much gender discrimination, too, in the area of employment practices and so forth. So I am more familiar with the statutory test. When you go back to the equal protection clause, I think there were the three tier analyses we were talking about, and that middle tier is up in the air, and I tried to answer that question yesterday.

Senator HATCH. Let me take the *Croson* case and the constitutionality of set-asides. Do you agree with the Supreme Court's holding in *Croson* v. *City of Richmond* that all racial discrimination by government, including discrimination against whites as well as discrimination against racial minorities, is to be judged by the same standard of strict scrutiny under the equal protection clause?

Judge BREYER. They said strict scrutiny, and that is a very, very difficult area, because that, very straightforward, if the area called affirmative action, and that affirmative action area is an area where the Court in a variety of ways has said affirmative action is appropriate, but you had better be certain you are remedying a real past wrong. That is necessary, in light of the real wrongs that were committed. Then when you look at that program, if you are righting a real past wrong, remember that affirmative action programs also have the ability to adversely affect people who themselves did nothing wrong, so please be certain that it is tailored carefully.

Then I know the courts made distinctions between taking something away from the person who did nothing wrong, like losing a job, which they have tended to frown upon, indeed, and not giving a person something that he never had, like a promotion, and work-

ing out what constitutes a proper tailoring in light of the possibility of hurting an innocent person, but in light of the need to correct past wrongs. That has all been considered in a group of cases which is complicated and difficult, as you can see the broad outlines, and *Croson* is one of those cases in which the Court has tried to decide what standard or how do we know if this is really to correct a past wrong. And in *Croson* they decided that they didn't think it was shown really this is necessary to carry a past wrong.

That is my understanding of how it is working.

Senator HATCH. I think your emphasis of people who did no wrong is very appropriate, because we are talking about reverse discrimination against people who really did not participate in the discrimination.

Judge BREYER. Yes.

Senator HATCH. It is a very serious matter and should only be used in only the most stringent of cases, which you have also pointed out, and some believe shouldn't be used at all, because there is no reason for somebody to lose because of something in the past that may have been wrong, but they didn't participate in it. So I appreciated that distinction.

Just two last areas, and they are both important. Judge Breyer, let me return to the subject of the ninth amendment. Senator Biden has raised that a number of times. Advocates of judicial activism often cite the ninth amendment as though it were a font of unenumerated and undefined constitutional rights to be spelled out at the whim of Federal judges. In fact, the natural meaning of the ninth amendment and the historical evidence lead to a very different conclusion, in my opinion.

As the law review article that I called to your attention and that you were so kind to read discusses, the Framers understood that the Constitution protects individual rights in two very different ways. First, and most importantly, it delegates only certain powers to the Federal Government. Matters beyond the powers of the Federal Government are thereby residually protected as a matter of right.

Second, the Constitution specifically enumerates certain other rights. As the historical evidence makes clear, the ninth amendment was adopted in response to the fear that the enumeration of certain rights in the first eight amendments of the Bill of Rights would be misconstrued to suggest that the Federal Government had general and unlimited powers. In other words, many thought that the inclusion of the Bill of Rights was not only unnecessary, but positively dangerous.

Under this reasoning, the first amendment guarantee of free speech, for example, was not necessary, since, if the Constitution were properly construed, the Federal Government had no enumerated power that enabled it to restrict speech. So that was their reasoning. The unnecessary listing of rights was dangerous, because it would invite the erroneous conclusion that the Constitution otherwise vested general powers in the Federal Government.

The ninth amendment was, therefore, adopted to make clear that the people retained other rights by virtue of their nondelegation of infringing powers to the Federal Government. Now, are you open to the historical evidence that supports the view that the ninth

amendment is not itself a source of affirmative rights against the Federal Government, but is, instead, a reminder that the people retain rights residually protected by virtue of the fact that the Federal Government is limited to the enumerated powers spelled out elsewhere in the Constitution?

Judge BREYER. Yes, I am open to that, because I think that in Justice Goldberg's concurrence, what Justice Goldberg said is that the ninth amendment is not itself a source of rights. Rather, it suggests that you shouldn't make a certain kind of argument, you shouldn't make the argument, just as you said, that the very fact that there is a Bill of Rights here with amendments listed means there aren't any others.

You can't make that argument, and since you can't make the argument, I think he was addressing himself to Justice Black. Since you can't make that argument, now let's go on to see if there are others, and he found the others not really in the 9th amendment at all, but found them in the 14th and the word "liberty."

Senator HATCH. Second, do you agree that the ninth amendment does not itself apply against the States? Do you not also agree that the 9th amendment is not incorporated against the States through of the due process clause of the 14th amendment?

Judge BREYER. Well, it seems to me that the ninth amendment is like a rule of construction, so I don't know what it would mean to be incorporated. I don't know how that could take place. I have never thought of how that could be. It doesn't sound as if it is the kind of thing. It sounds like it is a rule of construction, basically, since I have not heard the argument to the contrary.

Senator HATCH. Well, let me go further. While I disagree with the methodology adopted by Justice Goldberg in *Griswold,* that methodology in no way supports the view that such things as abortion and homosexual conduct are constitutionally protected.

Judge BREYER. It said look to the 14th amendment, and the case involved the right of marital privacy.

Senator HATCH. That is right. Justice Goldberg's reasoning was carefully confined to the marital relation and the marital home.

Judge BREYER. Yes.

Senator HATCH. As I recall, he expressly stated that his opinion did not call into question State laws regarding homosexual conduct.

Judge BREYER. He didn't say that expressly, I don't think, those words, but I think that is a fair interpretation.

Senator HATCH. Moreover, as I view it, his reasoning, which looks to whether a right is so rooted in the traditions and conscience of our people, would plainly not have extended to abortion, which has been prohibited in most instances for much of our history. Now, I am not asking you for an opinion on that. I am just making that comment. I think it has been a stretch by some to try and use *Griswold* to justify that particular opinion.

Let me just ask one final question, and these are constitutional questions that I think are of considerable import. In doing this, I am asking them so that they will be out on the table, so they will have been asked, so that nobody can say that you haven't discussed them with the committee. So I apologize for keeping you.

Judge BREYER. That is all right, Senator.

Senator HATCH. Let me just ask a few questions about the principle of stare decisis, the common law or prudential doctrine of adherence to precedence. Some have argued that a vastly different rule of stare decisis should operate for precedent that creates a new constitutional right, on the one hand, versus precedent that declines to create a new constitutional right, on the other.

Specifically, some have expressed the view that precedent, no matter how incorrect, that creates a new right should rarely, if ever, be overturned, while precedent that declines to create a new right should be freely overturned. Some have argued for this.

Now, under this view, for example, many liberals will argue that cases like *Roe* v. *Wade* and *Miranda* are sacrosanct precedent, but precedents like *Bowers* v. *Hardwick,* which held that there is no constitutional right to engage in homosexual sodomy, and cases upholding the death penalty should be overturned.

Now, what is your view of the theory of stare decisis?

Judge BREYER. My view is that stare decisis is very important to the law. Obviously, you can't have a legal system that doesn't operate with a lot of weight given to stare decisis, because people build their lives, they build their lives on what they believe to be the law. And insofar as you begin to start overturning things, you upset the lives of men, women, children, people all over the country. So be careful, because people can adjust, and even when something is wrong, they can adjust to it. And once they have adjusted, be careful of fooling with their expectation. Now, that is the most general forum.

When I become a little bit more specific, it seems to me that there are identifiable factors that are pretty well established. If you, as a judge, are thinking of overturning or voting to overturn a preexisting case, what you do is ask a number of fairly specific questions. How wrong do you think that prior precedent really was as a matter of law, that is, how badly reasoned was it?

You ask yourself how the law has changed since, all the adjacent laws, all the adjacent rules and regulations, does it no longer fit. You ask yourself how have the facts changed, has the world changed in very important ways. You ask yourself, insofar, irrespective of how wrong that prior decision was as a matter of reasoning, how has it worked out in practice, has it proved impossible or very difficult to administer, has it really confused matters. Finally, you look to the degree of reliance that people have had in their ordinary lives on that previous precedent.

Those are the kinds of questions you ask. I think you ask those questions in relation to statutes. I think you ask those questions in relation to the Constitution. The real difference between the two areas is that Congress can correct a constitutional court, if it is a statutory question, but it can't make a correction, if it is a constitutional matter. So be pretty careful.

Senator HATCH. Unless they pass a constitutional amendment to do that.

Judge BREYER. Yes, that's true. It is very hard to do.

Senator HATCH. Let me just ask one last question. Does stare decisis operate differently with respect to constitutional and statutory rights?

Judge BREYER. In principle, I think the questions are the same, questions that one would ask. I think that one would recognize the difference that you just mentioned and I did about the comparative difficulties of correcting a mistake.

Senator HATCH. I am very concerned that giving substantial deference to prior erroneous rulings on a broad range of constitutional issues, in effect, just permits the Supreme Court to amend the Constitution, without complying with the amendment procedures spelled out in article V. I am concerned about that. There may well be certain rulings that are so long standing and that are so imbedded in the way that governmental institutions have developed that they are entitled to deference. But this category should be a narrow exception, or else the Supreme Court is able to usurp power through erroneous rulings. So I am concerned about that.

Judge, this has been a long day. These 2 days have been long days, but I personally believe that you have acquitted yourself quite well.

Judge BREYER. Thank you.

Senator HATCH. We have appreciated the way that you have handled these matters, and I certainly want to compliment your family for enduring this. Please feel free to get up and walk around or leave any time you want to. We know how difficult this is from time to time. But it is a very important constitutional process.

Judge BREYER. Yes, it is.

Senator HATCH. And I want to compliment my colleagues for the questions that they have asked during this process. I think you have seen a lot of sincerity, a lot of dedication, a lot of desire to try and explore some of these areas with you. But I, for one, feel very good about most everything that you have answered here.

Judge BREYER. Thank you.

Senator HATCH. I hope you can go have a nice evening and get a good night's rest. What we are going to do is we are going to resume tomorrow morning at 9:30 a.m., and we will immediately thereafter go into closed session, as Chairman Biden previously announced.

With that, we will recess the hearings until 9:30 in the morning.

[Whereupon, at 6:19 p.m., the committee was in recess, to reconvene on Thursday, July 14, 1994, at 9:30 a.m.]